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ADOPTION OF ENGLISH PRACTICE ACT IN VIRGINIA.

TO THE PRESIDENT AND MEMBERS OF THE VIRGINIA STATE BAR ASSOCIATION.—The undersigned committee on Amendment of Practice, respectfully report that, in pursuance of the resolution adopted at the last meeting "to consider and report to the next meeting the advisability of memorializing the General Assembly of Virginia to adopt the English Practice Act, with such modifications as may be deemed best," they recommend such appropriate action as may be proper to secure the benefits of the English system for our courts. It is fair to state that it leads to the fusion of law and equity procedure into one form of action.

Under that system "A modern action, in the popular sense of that word, is commenced by a writ of summons, which states simply the general nature of the plaintiff's complaint. Neither in the endorsement upon such writ, nor in the subsequent pleadings, is it necessary to state in any particular or stereotyped form the facts upon which he relies. Pleadings are no longer technical in the sense that they must show the precise legal form which the plaintiff's demand must take; they now show the facts, and then it is for the court, from the facts, to decide upon the legal result of those facts * * *." (Laws of England, by the Earl of Halsbury, vol. 1, p. 47, 1907.)

Under our system, in the language of the Supreme Court of Appeals of Virginia, in the case of Lynchburg Traction Co. *v.* Guill, 13 Va. Law Reg. 542:

> "Negligence is a conclusion of law from facts sufficiently pleaded. The office of a declaration is to inform the defendant of the case which it has to meet, so that it may have a reasonable opportunity to prepare and make its defense. It is not enough to say that the plaintiff was injured and that the injury resulted from the careless and negligent conduct of the defendant; but the facts relied upon to establish the negligence must be stated with reasonable certainty."

This idea of formalism and technicality pervades all of our

decisions. It has been repudiated in England, since 1872, which is more than a generation ago.

In vol. 11, "Encyclopædia of the Laws of England" (2nd Edition), published in London, England, in June, 1908, the best statement of the changes introduced by the Judicature Act of 1873, is to be found. It is as follows:

Changes Introduced by the Judicature Act.

The principles on which pleadings were framed in the days of the Plantagenets, and the rules which regulated them then, continued substantially the same into the last century (nineteenth century). Their practical utility was, however, seriously impaired by the over-subtlety of the pleaders and by the excessive rigour with which the rules were applied; the merits of the case being entirely subordinated to technical questions of form. A determined effort was made to correct these defects by passing the Common-Law Procedure Acts, 1852-1860. In 1873, however, it was found necessary to adopt a more thorough reform; and the Judicature Act, introduced into the new High Court of Justice the system of pleading which, with some slight modifications, is still in force.

The most material changes made by this act in the rules relating to pleading were the following:

(I) Forms of action were abolished. A plaintiff need no longer specify the particular form of action in which he seeks to recover judgment. He is now allowed to state the facts on which he relies, and the court will grant him the remedy to which on those facts he is entitled.

(II) Each party must now state facts and not conclusions of law. He was bound, before 1875, to set out with reasonable precision the points which he intended to raise; but this he generally did by stating, not the facts which he meant to prove, but the conclusion of law which he sought to draw from them. His opponent thus learned that he desired to prove some set of facts which would sustain a given legal conclusion; but how he proposed to sustain that legal conclusion was not disclosed. For instance, there was a very common form of declaration: "For money received by the defendant to the use of the plaintiff." A claim in that form might be established by some six or seven entirely different sets of facts, and it could not be ascertained from the plaintiff's pleading which set of facts would be set up at the trial, to show that the particular money claimed was received to the use of the plaintiff. Now the plaintiff

must plead the facts on which he proposes to rely as showing that the sum of money which he claims was received by the defendant to his use.

(III) So, too, with the defence. "The general issue" is abolished. In an action for goods sold and delivered, the defendant was formerly allowed to plead that he "never was indebted as alleged." This is a conclusion of law, and at the trial it was open to him to give in evidence under this plea any one or more of several totally different defences; e. g., that he never ordered the goods; that they never were delivered to him; that they were not of the quality ordered; that they were sold on a credit which had not expired at the time that the action was commenced; or that the Statute of Frauds had not been complied with. Now a mere denial of the debt is inadmissible. So in an action for money received to the use of the plaintiff, the defendant must either deny the receipt of the money, or the existence of those facts which are alleged to make such receipt a receipt to the use of the plaintiff.

So in actions of tort, the defendant was formerly allowed to plead "the general issue" not guilty. Under that plea it was open to him at the trial to raise several distinct defences. Thus the defendant in an action of libel or slander by one short and convenient plea of "Not Guilty," simultaneously denied the publication of the words complained of, denied that he published them in the defamatory sense imputed by the inuendo, or in any defamatory or actionable sense which the words themselves imported, asserted that the occasion was privileged, and also denied that the words were spoken of the plaintiff in the way of his profession or trade, whenever they were alleged to have been so spoken. But now this compendious mode of pleading is abolished. "Not Guilty" can no longer be pleaded in a civil action. The defendant must deal specifically with every allegation of which he does not admit the truth.

(IV) Demurrers were abolished. It is true that either party is still allowed to place on record an *objection in point of law*, which is very similar to the former demurrer. But there is this important difference. The party demurring could formerly insist on having his demurrer separately argued, which caused delay. But now such points of law are argued at the trial of the action; it is only by consent of the parties, or by order of the court, or a judge, that the party objecting can have the point set down for argument and disposed of before the trial. And, as a rule, such an order will only be made where the decision of the point of

law will practically render any trial of the action unnecessary.

(V) Pleas in abatement were abolished. If either party desires to add or strike out a party, he must apply by summons. No cause or matter now "shall be defeated by reason of the misjoinder or nonjoinder of parties."

(VI) Equitable relief is now granted, and equitable claims and defences are now recognized, in all actions in the High Court of Justice.

(VII) Payment into court was for the first time allowed generally in all actions.

(VIII) The right of set-off was preserved unchanged; but a very large power was given to a defendant to counterclaim. He can raise any kind of cross-claim against the plaintiff; and in some cases even against the plaintiff with others, subject only to the power of a master or judge, to order the claim and cross-claim to be tried separately, if they cannot conveniently be tried together.

(IX) The defendant is also allowed in certain cases to bring in third parties and claim contribution or indemnity against them in the original action in which he himself is sought to be made liable.

(X) The names of the principal pleadings were changed. A statement of claim takes the place of the former *declaration*. Instead of *pleas*, the defendant now delivers a defence, or, it may be, a defence and counterclaim. The *replication*, is now called a reply. The further pleadings, which now are rarely seen, retain their ancient names: *Rejoinder, surrejoinder, rebutter*, and *surrebutter*. (pp. 161-2-3).

(The article from which the above is taken is by W. Blake Odgers, K. C., a famous law writer.)

The fundamental rule of the present English system of pleading is, that every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

Since the Code of 1849, more than a half century, the following act has been one of our statutes:

Code of Virginia (1904) "Sec. 3112. Court of Appeals may prescribe forms of writs and regulate practice of Courts. The supreme court of appeals *may*, from time to time, prescribe the forms of writs and make general regulations for the practice of all the courts; and *may* prepare a system of rules of practice, and a system of pleadings, and the

forms of process to be used in all the courts of this state; and when the same are prepared, the court shall make report thereof to the General Assembly, in order to further legislation in the premises. (Code 1849, p. 625, c. 161, § 4; 1869-70, p. 365.)

A similar act was the origin of the now famous English procedure which was formed by the great English judges, with Lord Chancellor Selborne taking the lead.

In our Country, the Bankruptcy Act of 1898, § 30, expressly provides that "all necessary rules, forms and orders, as to procedure, and for carrying this act into force and effect, *shall* be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

They have prescribed such a set of rules and forms that no case, or technicality of that character has ever found its way to our great court of last resort.

Our act of 1849 would have been of great value had the word "shall" been inserted in the place of the word "may." As it is, it has been of no service to the people or the profession, for the court has never acted upon it. It is not going too far to say this great reform cannot be carried into effect without the active aid of the Supreme Court of Appeals of Virginia.

At the last session of the General Assembly, the following bills were introduced and favorably reported from the committees:

HOUSE BILL NO. 140.

A BILL.

To provide when demurrer shall not lie to declarations in actions for torts.

Patron—MR. MONTAGUE.

Reported from Committee for Courts of Justice.

Be it enacted by the General Assembly of Virginia, That no demurrer shall lie to a declaration for a tort which shall state the place and the time of the injury with reasonable certainty, and in general terms the facts of the occurrence; but it shall not be necessary to set out in such declaration the details or particulars of the defendant's negligence. Provided, that nothing herein shall effect the right of the defendant to require a statement to be filed of the bill of particulars as now allowed by law.

HOUSE BILL No. 231.

A BILL.

Providing for remedy by motion after thirty days' notice for any tort; when notice to be returned to clerk's office; provision to prevent discontinuance of the motion.

Patron—MR. MONTAGUE.

Reported from Committee for Courts of Justice.

Be it enacted by the General Assembly of Virginia, That any person having a right of action at law for any tort, may, on motion before any court which would have jurisdiction in an action otherwise than under section thirty-one hundred and fifteen, obtain judgment for such tort after thirty days' notice, which notice shall be returned to the clerk's office of such court, within five days after the service of the same, and after such thirty days' notice, the motion shall be docketed. A motion under this section which is docketed under section thirty-three hundred and seventy eight, shall not be discontinued by reason of no order of continuance being entered upon it from one day to another, or from term to term. The defendant shall have the right at any time within ten days after the service of such motion on him to require by order of the court to which such motion is returnable or by written notice duly served, the plaintiff to file within ten days after receiving notice thereof, a statement in writing of the particulars of his claim, as provided in section thirty-two hundred and forty-nine of the Code.

HOUSE BILL No. 335.

A BILL.

Regarding the defence of contributory negligence in actions for a tort, where the evidence shows that the defendant had been guilty of negligence, in the violation of an express requirement or prohibition of a statute or a city ordinance.

Patron—MR. MONTAGUE.

Reported from Committee for Courts of Justice.

Be it enacted by the General Assembly of Virginia, That when upon the trial in action for a tort, it shall be proven by the preponderance of the evidence, that

the defendant was guilty of negligence in the violation of an express requirement or prohibition of a statute, or of a city ordinance, as to the crossing of a street or highway, the plaintiff shall not be absolutely barred from a recovery, because he was guilty of contributory negligence, but the jury shall be instructed to determine from all the evidence, whose negligence tended more strongly to produce the injury or loss, and to find a verdict accordingly, and if a verdict be found in favor of the plaintiff, the jury shall in determining the amount of such verdict, consider the negligence of the plaintiff, as disclosed by the evidence, in mitigation of the damages.

Another bill, abolishing the rule as to the liability of joint tortfeasors as laid down in Petticolas *v.* City of Richmond, 95 Va. 456, was introduced and earnestly pressed, but it never got out of the Committee for Courts of Justice of the House. It is as follows:

A BILL.

Providing that no plea of a former judgment against a co-tortfeasor or trespasser, shall be held to be sufficient or shall be received by any court in any action against a co-tortfeasor unless said plea shall aver that such judgment has been paid in full.

Patron—A. S. HALL.

Be it enacted by the General Assembly of Virginia, That when an action is brought against one of several joint trespassers, or joint tortfeasors, and judgment is obtained by the plaintiff, such judgment shall be no bar to a further or other action against the other tortfeasors, or trespassers, unless it shall be averred and proved that such judgment has been paid in full; and it shall be unlawful for any court to receive any plea of such former judgment, unless it contains averments of such payment.

In the hurry of a short session of sixty days it is almost impossible to get through even the best-considered measures relating to procedure. The true remedy is with the Court of Appeals, actively aided by the bar.

For English-speaking countries, the present English procedure

is the best, and we most earnestly recommend its adoption in this state.

Respectfully submitted,
R. T. W. DUKE, JR.
R. T. BARTON.
S. S. P. PATTERSON.

Hot Springs, Virginia,
August 3rd, 1908.

The undersigned member of the committee, while impressed with the need of further simplification of pleading and practice in Virginia, is not satisfied that the plan proposed by the committee is feasible, and therefore withholds his signature from the report.

C. A. GRAVES.

Aug. 1, 1908.